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In The
Supreme Court of the United States
October Term, 1984

MICHELIN TIRE CORPORATION,
Petitioner,

v.

ITCO CORPORATION,
Respondent,

and

STATE OF NORTH CAROLINA,
Amicus Curiae.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

JOHN R. JORDAN, JR.
(Counsel of Record)
CHARLES GORDON BROWN
MARTHA LEANN NEASE
JORDAN, BROWN, PRICE & WALL
Suite 100, One West Franklin Building
P.O. Box 1210
Chapel Hill, NC 27514
(919) 968-1111

SAMUEL W. JOHNSON
MEADOWS, JOHNSON & SPINKS
P.O. Box 153
Rocky Mount, NC 27801
(919) 977-2211

JOHN F. DIENELT
BROWNSTEIN, ZEIDMAN & SCHOMER
Suite 900, 1025 Connecticut Avenue
Washington, DC 20036
(202) 457-6577

Counsel for Respondent

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COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

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QUESTIONS PRESENTED

1. Did the Fourth Circuit err when it remanded this case to the District Court for trial after holding that there was a genuine factual question for the jury as to whether Michelin's decision to terminate ITCO was a step in furtherance of a conspiracy to lessen price competition at the dealer level?

2. Did the Fourth Circuit err when it rejected the applicability of *res judicata* to the facts of this case?

3. Did the Fourth Circuit err when it ruled that there were genuine issues of material fact as to whether Michelin's decision to terminate its relationship with ITCO Corporation violated the North Carolina Unfair Trade Practices Act, N.C.G.S. §75-1.1 et seq.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

In its Petition, defendant Michelin Tire Corporation ("Michelin") ascribes far more to the Fourth Circuit's holding in the case than even the most aggressive reading of the opinion will support. In reversing the District Court's grant of summary judgment, the Fourth Circuit merely ruled that there was a viable theory of relief which ITCO Corporation ("ITCO")[1] could pursue and that the

[1]All parties to this action are listed in the caption. Pursuant to U.S. Supreme Court Rule 28.1, counsel for ITCO Corporation certify that it has no affiliates, subsidiaries or parent companies.

District Court erred by removing that legal theory from the case prior to an adjudication of the disputed facts.

This Court should deny Michelin's Petition not only because the Fourth Circuit correctly applied settled legal principles, but because it does not present "special and important reasons" for review as required by U.S. Supreme Court Rule 17.1, 28 U.S.C.A.

I. The Facts

In 1973 and 1974, Michelin, whose ultimate parent is a French tire manufacturer, embarked on a full scale campaign to penetrate the American market to assure demand for the tires to be produced from its soon-to-be opened manufacturing facilities in the United States. The object of this campaign was to sign as many dealers as possible and to encourage wholesaling. (A. 1252, 1325-1326, 1900).[2] When ITCO, an independent tire distributor headquartered in Wilson, North Carolina, answered a Michelin advertisement for dealers in the spring of 1974 (A. 554-555), a Michelin territory representative was dispatched to interview ITCO's management and compile information about its business. (A. 990-991, 993). In particular, the interviewer requested information about ITCO's retail service facilities. Based on the data obtained, Michelin learned that approximately eighty-five percent of ITCO's

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[2]("A——") refers to pages of the two volume joint appendix filed in the United States Court of Appeals for the Fourth Circuit. The materials so referenced have been lodged with the Clerk of the Supreme Court. ("Pet ——") refers to page numbers in Michelin's Petition for Writ of Certiorari to this Court. ("Pet.A ——") refers to the opinion of the Fourth Circuit in this case. In lieu of citing to the reporter, *ITCO Corp. v. Michelin Tire Corp.*, 722 F.2d 42 (4th Cir. 1983) *aff'd mem. on rehearing*, 742 F.2d 170 (4th Cir. 1984) is cited to the pages of Petitioner's Appendix for the convenience of the Court.

business at that time was wholesale. (A. 394, 478, 555, 992-993, 1035).

On September 25, 1974, ITCO was approved and an initial Dealer Sales Agreement was entered into. (A. 1448-1451). Paragraph 2(a) of that agreement required dealers to provide for the retail sale of Michelin products and to establish a place of business enabling the dealer to sell and service Michelin products in a first class manner. Only one of ITCO's locations was listed in the agreement since ITCO's other locations could not technically qualify under paragraph 2(a). (A. 997, 1448). However, Michelin and ITCO had an "understanding" that ITCO's other locations would be added later as "ship-to-points" and be listed on the Dealer Sales Agreement even though some of them lacked retail service. (A. 1009-1010).

Effective April 23, 1975, a new Dealer Sales Agreement was executed which listed eight additional ship-to-points. (A. 1050-1051, 1457-1461). Included among these were warehouses located in Charlotte and Wilson (A. 1461) which provided no retail service. In 1976, while Michelin continued to encourage ITCO's purchases for delivery to the Charlotte and Wilson warehouses (A. 1489), it approved another ITCO warehouse in Virginia Beach, Virginia (A. 500, 1490, 1511, 1544). Michelin representatives at every sales and management level had full knowledge that at least three of ITCO's ship-to-points were warehouses only. (A. 808, 843, 1014-1015, 1463).

In January, 1977, Michelin first hinted that the Charlotte wholesale operation was of some concern. In response, an understanding was negotiated between the parties that the Charlotte location would remain on the Dealer

Sales Agreement and ITCO would try to put a retail location in Charlotte at some indefinite future time. As a Michelin employee phrased the agreement, "Our answer was they [ITCO] would do this but could not give a commitment as to time. They did not think it would be feasible in 1977, but that it may be in 1978; their own capitalization permitting." (A. 1542-1543). The only consequence of "noncompliance" discussed was a removal of the Charlotte warehouse as an authorized ship-to-point. (A. 728, 744, 811, 1041).

Throughout most of 1977, ITCO and Michelin continued to do business as usual. Michelin added two new ITCO stores as authorized ship-to-points. (A. 1560-1561, 1564-1573). At the close of 1977, ITCO broke the $2,000,000.00 milestone in annual purchases from Michelin. (A. 1684). In fact, Michelin solicited from ITCO its largest ever purchase order in December, 1977. (A. 1620, 1900).

On December 22, 1977, and without warning, ITCO was notified that all eleven ship-to-points were terminated. (A. 1620). Michelin volunteered no explanation for the termination and allowed no opportunity for cure of any "deficiency." The only explanation that ITCO could wrest from Michelin was "corporate marketing decision." (A. 1621). During discovery, each Michelin officer and employee deposed stated, without qualification, that lack of retail service in Charlotte was the *only* reason for termination. (A. 422, 666, 762, 829, 870, 1262, 1084-1086).

However, the facts obtained in discovery show that ITCO was really terminated by Michelin in an effort to eliminate large wholesaler competition. Due to Michelin's discount programs, large wholesalers, like ITCO, could

sell tires to prospective Michelin retailers for less than Michelin itself was willing to sell them. As the Fourth Circuit observed:

> Not only could ITCO effectively undercut the prices offered by the smaller authorized dealers in the *retail* consumer market, but ITCO also could compete effectively with Michelin itself in the *wholesale* market, on sales to retail tire merchants who had not entered a dealership agreement with Michelin. Both phenomena, it is alleged, drew the ire of ITCO's competitors, authorized dealers who thus faced increased competition on the one hand from ITCO, and on the other hand, from unauthorized retail dealers who purchased tires from ITCO at wholesale prices lower than those offered to the complaining, authorized, dealers by Michelin.

(Pet. A-8) (emphasis in original). The fact that Michelin considered this competition a "problem" is well documented in the record. (A. 1562-1563, 1555-1559). Smaller authorized Michelin dealers complained they could not compete with the large wholesalers (A. 1562-1563), and Michelin determined that this "problem" could "only be corrected by a change in our dealer sales program to discourage large scale wholesaling . . .". (A. 1562-1563).

In response to competition in wholesaling and complaints from its retail sellers, Michelin terminated its four largest East Coast wholesalers—ITCO, Bostick Oil Co., Inc. ("Bostick"),[3] Donald B. Rice Tire Co.,[4] Inc. ("Rice")

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[3]*Bostick Oil Co. v. Michelin Tire Corp., Comm. Div.*, 702 F.2d 1207 (4th Cir.), *cert. denied* — U.S. —, 104 S.Ct. 242 (1983) (evidence sufficient to present a jury question as to whether Michelin contracted, combined or conspired in a restraint of trade).

[4]*Donald B. Rice Tire Co. v. Michelin Tire Corp.*, 638 F.2d 15 (4th Cir.), *cert. denied*, 454 U.S. 864 (1981) (*inter alia*, trial judge's finding of conspiracy affirmed).

and Englewood Tire Distributors ("Englewood").[5] Michelin has admitted that its smaller dealers made complaints directly about ITCO as well as about Rice and Bostick.[6] (A. 746, 749, 755-756, 1479-1484, 1485-1486, 1611-1613).

In evaluating the propriety of the District Court's award of summary judgment, the Fourth Circuit felt that Michelin's own records showed a colorable Sherman Act claim:

> Crucially, for antitrust purposes, it is alleged that ITCO's disenchanted competitors aired their gripes to Michelin in what amounted to a call for protective action from the manufacturer. ITCO directs our attention to a notation made by Michelin's district manager which purportedly logs one such complaint:
>
> > Dealer very upset over the large amount of wholesaling taking place in his area. Retail selling prices he claims are floating at 20 to 30% below suggested exchange. Wholesale selling prices are normally at 30 + 5 off.
>
> Michelin responded to the lament of the smaller dealer, ITCO asserts, by deciding to terminate its dealer

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[5]Of the four dealers terminated, Englewood, alone, was reinstated and then only after Michelin exacted an agreement not to compete in the discount wholesaling of tires (A. 1785, 1788-1790).

[6]In conjunction with termination of its largest wholesalers and the exacting of agreements from other wholesalers, Michelin cut back on its wholesaling discounts and increased its standard dealer discounts. (A. 1442-1444, 1452-1453, 1466-1467, 1532-1534, 1623-1626, 1686-1687, 1808-1812, 1853-1854, 1865-1867). Michelin also embarked on a program to expand its own wholesale capacity. (A. 1905). Michelin opened a new warehouse to serve the predominant portion of ITCO's trading area in January, 1978, one month after ITCO's termination. (A. 1309, 1535, 1620, 1631, 1905). Similar circumstances attended Rice's (A. 1309-1310, 1468, 1535, 1905) and Bostick's terminations (A. 1747).

arrangements with four similarly situated large dealers—ITCO itself, Bostick, Rice, and Englewood Tire Distributors. In support of that contention, ITCO points to a memorandum written by Michelin's district manager, recommending that the manufacturer terminate its dealings with the "large wholesalers" and, in particular, with Bostick:

> I feel that in the long run, we would be better off without the large wholesaler such as Bostick Oil Co., Inc. . . . [T]he overall morale of the rest of our dealers in this area would improve considerably.

The memorandum goes on to suggest, albeit less than directly, that the disenchantment of rival dealers with the price-cutting actions of the "large wholesalers" figured in the decision:

> Another greater possibility is that another large wholesaler would simply see a great opportunity and pick up where Bostick left off [if Bostick alone were terminated]. Due to this, it would appear to me that if a move is made to get rid of the large wholesalers whom we are in competition with, this move would have to be made throughout other areas as well. In other words, I find it difficult to see how we could ever be selective as just what wholesalers we are going to keep.

In concluding, the memorandum listed the largest wholesalers in the Charlotte, North Carolina district. Bostick was listed. So was ITCO.

(Pet. A-8 to 9).

On motion for summary judgment, the District Court denied Michelin's motion as to ITCO's claim under §1 of the Sherman Act. However, the District Court granted summary judgment for Michelin on ITCO's claim under

North Carolina's Unfair Trade Practices Act, N.C.G.S. §75-1.1. In response, ITCO filed a motion for leave to file an interlocutory appeal (A. 279-281, 287-290). Although the District Court denied the motion, it apparently recognized the inconsistency of its ruling and invited ITCO to move for reconsideration of its summary judgment ruling. After Michelin objected, however, the District Court decided to stand by its initial decision and denied ITCO's motion for reconsideration (A. 290-300).

Because of the untenable substantive posture in which the District Court's ruling put ITCO, and because of the importance of the §75-1.1 claim to its case, ITCO was forced to appeal. To do this, it had to "voluntarily" dismiss its Sherman Act claim in order to have a final and appealable judgment.[7]

To avoid any later contention that its dismissal of the Sherman Act claims created *res judicata* problems, Counsel for ITCO specifically noted that ITCO reserved the right to prove "§1 facts" as one of the bases of Michelin's liability under §75-1.1. The District Judge responded:

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[7]As the Fourth Circuit noted: "ITCO's purpose in seeking immediate review of the defeat of its state law claim will become increasingly evident as this opinion develops. Suffice it to say that, under ITCO's understanding of the scope of the North Carolina Unfair Trade Practices Act, there is no relief and no legal theory available under the Sherman Act count which would not also be available under the state act. Conversely, however, there might be legal theories to pursue under the state act which the Sherman Act would not recognize. The economics of litigation, along with the not unique desire to go to trial with, as ITCO's counsel put it at oral argument, a full quiver of arrows, prompted ITCO's decision to pursue a prompt appeal."

(Pet. A-10, n.7).

> Well, I stated before on that that I don't see that this dismissal at all has anything to do with the relevancy of any evidence that would have been available to you under your Section 1 claim as against a Chapter 75 claim. . . . I see nothing to prohibit your going ahead and proving that claim with whatever relevant evidence is available to you.

(Pet. A-18). In response to a request for clarification from counsel for Michelin, the District Court further explained: "He [ITCO's counsel] is *reserving* his right to bring witnesses here who would have testified to facts which had they been within the context or the ambit of a Section 1 claim would also be relevant on the Chapter 75 claim." (Pet. A-19) (emphasis supplied). Michelin's counsel responded to this explanation as follows: "Put simply, not to litigate those facts applicable to the Sherman Act claims unless they would have been independently relevant to Chapter 75." (Pet. A-19). Thus, there is no question that both parties and the District Court Judge understood that ITCO's dismissal with prejudice of its §1 claim was predicated upon the express reservation of the right to use "§1 facts" to prove a case under §75-1.1.

II. The Fourth Circuit's Decision.

The Fourth Circuit reversed the District Court's dismissal of ITCO's §75-1.1 claim on summary judgment, and the case was remanded to the District Court.

The Fourth Circuit held that:

1. The District Court was in error when it granted summary judgment on ITCO's unfair trade practices claim since a claim cognizable under §1 of the Sherman Act is also cognizable under the broad sweep of North Carolina's Unfair Trade

Practices Act and there was a genuine issue of material fact as to whether Michelin's decision to terminate its relationship with ITCO was a step in furtherance of a conspiracy to lessen price competition at the dealer level. (Pet. A-11 to A-14).

2. ITCO's voluntary dismissal of its claim under §1 of the Sherman Act had no *res judicata* effect on its alternative claim under North Carolina's Unfair Trade Practices Act when both claims were raised in the same suit. (Pet. A-15 to A-21).

SUMMARY OF ARGUMENT

1. Because a violation of §1 of the Sherman Act is also a violation of N.C.G.S. §75-1.1, the District Court's ruling that the §1 claim should go to trial while the §75-1.1 should not was inherently contradictory. The Fourth Circuit's ruling corrected that contradiction. *Monsanto v. Spray-Rite Service Corp.*, — U.S. —, 104 S.Ct. 1464 (1984) had not been decided when the Fourth Circuit opinion in this case was handed down, so it can hardly be argued that the Fourth Circuit has "ignored" *Monsanto*. Michelin's implication that, on remand, the District Court might not follow *Monsanto* is sheer speculation. This is especially true since the Fourth Circuit opinion really does not deal with evidentiary standards of conspiracy—a matter that will be of far more interest to the District Court on remand. Moreover, the issue of "§1 facts" is not dispositive since the Fourth Circuit recognized that the case will necessarily go to trial as to other elements of the §75-1.1

claim. Finally, ITCO's facts, considered in light of the standards established by *Monsanto,* clearly show triable issues of fact that must necessarily be resolved on remand.

2. The Fourth Circuit's rejection of Michelin's novel and perverse application of the doctrine of *res judicata* is based on well settled law and the policies and purposes behind the doctrine. An application of established principles of law is not within the character of reasons warranting review by writ of certiorari.

3. *United States v. Colgate & Co.,* 250 U.S. 300 (1919) and *United Roasters, Inc. v. Colgate-Palmolive Co.,* 649 F.2d 985 (4th Cir.) *cert. denied,* 454 U.S. 1054 (1981) do not allow a manufacturer to conspire to fix, maintain or stabilize resale prices. A manufacturer does not have a right to refuse to deal with whomever it likes when such refusal is part of an unlawful scheme. Michelin's conduct presents genuine issues of material fact as to whether its decision to terminate ITCO violates §75-1.1.

ARGUMENT

I.

The Fourth Circuit Did Not Err In Reversing The District Court

A. The issue before the Court of Appeals was whether the District Court erred in dismissing ITCO's claim under the North Carolina Unfair Trade Practices Act, N.C.G.S. § 75-1.1.[8] That statute provides:

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[8]N.C.G.S. § 75-16 makes available a private cause of action to an injured party.

> Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

N.C.G.S. § 75-1.1 is almost identical to Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a) (1). The North Carolina Supreme Court has held that "[b]ecause of the similarity in language, it is appropriate for us to look to the federal decisions interpreting the FTC Act for guidance in construing the meaning of . . . § 75-1.1". *Johnson v. Phoenix Mutual Life Insurance Company,* 300 N.C. 247, 262, 266 S.E.2d 610, 620 (1980). It is an accepted tenet of basic antitrust law that Section 5 of the Federal Trade Commission Act prohibits conduct condemned by Section 1 of the Sherman Act, 15 U.S.C. § 1. *FTC v. Beech-nut Packing Co.,* 257 U.S. 441 (1922). ITCO's § 1 claim is particularly important to this case because the District Court ruled against Michelin's summary judgment motion as to the § 1 claim while it granted summary judgment as to the § 75-1.1 claim. Since facts sufficient to constitute a violation of § 1 (which the District Court ruled ITCO had shown for summary judgment purposes) would also be sufficient to constitute a violation of § 75-1.1 (which the District Court had eliminated), the District Court's rulings were irreconcilably contradictory.[9]

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[9]The Fourth Circuit acknowledged this circumstance in *Bostick, supra,* where, in a substantially identical case, the plaintiff had made claims under the Sherman Act and the South Carolina Unfair Trade Practices Act, § 39-5-20(a).

The South Carolina district court had dismissed the Sherman Act claims. The Fourth Circuit reversed, holding that there were genuine issues of material fact sufficient to go to the jury.

(Continued on following page)

After reviewing the evidence, the Fourth Circuit held that "there being manifested a genuine issue of fact material, indeed, crucial to ITCO's *state law claim,* it follows that the district court incorrectly granted summary judgment for Michelin on that claim and that the judgment must be reversed." (Pet. A-15). (emphasis supplied).

B. Essential to Michelin's justification for the worthiness of this case to be accepted for decision on certiorari is the notion that the Fourth Circuit's opinion perpetuates a standard of proof that was rejected in *Monsanto, supra.* This notion is unfounded. The opinion in ITCO was issued long before *Monsanto* was decided in this Court.[10] Moreover, ITCO was decided on *procedural* grounds, and the issue of standards of proof applicable to inferences of conspiracy were neither squarely presented nor decided.

(Continued from previous page)

Perforce, this meant that the district court's dismissal of the state Unfair Trade Practices Act also had to be reversed since a jury question as to Sherman Act violations presented a similar jury question as to state law violations. The Fourth Circuit wrote:

> "Accordingly, evidence sufficient to withstand a motion for directed verdict on the federal causes of action provides at least as sufficient a basis for also requiring jury determination of the state law claim."

Id. at 1220.

[10]After *Monsanto* was decided, the Fourth Circuit did hear reargument in the instant case. Michelin's counsel attempted to argue the *Monsanto* standard of liability at oral argument, but the panel indicated that the *Monsanto* issue had little or no bearing on the rehearing. Likewise, *Bostick, supra,* was also decided prior to *Monsanto.* It is noteworthy that Michelin advanced some of these same arguments in its certiorari petition to this Court in *Bostick.* This Court denied certiorari in *Bostick* even though the issue of proof of conspiracy was more squarely presented; the same fate should befall Michelin's instant petition where, as here, there is no reason to assume that the District Court will be unfaithful to *Monsanto's* teachings on remand.

The Fourth Circuit remanded this case to the District Court with instructions to try the issues raised by the §75-1.1 claim. It gave broad instructions that the success of ITCO's theory of relief on the "§1 facts" element of §75-1.1 "hinges upon proof satisfactory to convince the factfinder that Michelin's decision to terminate its relationship with ITCO was a step in furtherance of a conspiracy to lessen price competition at the dealer level." (Pet. A-14). The Fourth Circuit concluded only that there was an issue of fact to be tried on the merits, and that "what the resolution of that factual issue will be ultimately we do not know and we do not intimate." *Id.*

Michelin is attempting to have this Court grant its motion for summary judgment as to the "§ 1 facts." The District Court refused to do so. The Fourth Circuit refused to do so. This Court should also refuse to do so. There is no reason to believe that, on remand, the District Court will not adhere to *Monsanto.*

C. Further, Michelin's suggestion that ITCO's case will fail absent proof of conspiracy misstates the nature of the § 75-1.1 claim. Even if the Fourth Circuit had eliminated "§ 1 facts" as an element of ITCO's § 75-1.1 claim, such elimination would not have been dispositive of the case. Section 75-1.1 incorporates broad standards for liability and, in addition to proof of "§ 1 facts" as an element of Michelin's liability, ITCO identified several other ways Michelin's conduct violated North Carolina law, including: (1) violation of policies underlying § 5 of the Federal Trade Commission Act,[11] (2) commission of in-

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[11]The violations identified include: (a) inequitable assertion of power or position, *Spiegel, Inc. v. F.T.C.*, 540 F.2d 287

(Continued on following page)

cipient federal antitrust violations,[12] (3) violation of North Carolina antitrust laws (including a statute prohibiting *unilateral* price fixing),[13] (4) violation of North Carolina's

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(7th Cir. 1976), which has been held to be the very essence of unfair trade practice under North Carolina law in *Johnson, supra* 266 S.E.2d at 622; (b) use of contract termination to force distributors into anticompetative behavior, *Adolph Coors Co. v. F.T.C.*, 497 F.2d 1178 (10th Cir. 1974), *cert. denied*, 491 U.S. 1105 (1975); see also *F.T.C. v. Texaco, Inc.*, 393 U.S. 223 (1968) (dealer termination a means of unlawfully asserting dominant power or position); *Atlantic Refining Co. v. F.T.C.*, 381 U.S. 357 (1965) (lease cancellations used to coerce dealers); *Phillips Petroleum Co.*, 84 FTC 1666 (1974) (arbitrary cancellation without cause or explanation compelling dealers to operate under fear of arbitrary cancellation ended by consent order); *Onkyo U.S.A. Corp.*, CCH Trade Reg. Reports ¶21,935 (FTC Dkt. C-3092, 1982) (consent decree prohibiting Onkyo from terminating a dealer in an effort to maintain resale prices); (c) procuring unwilling compliance of other wholesalers through termination and threats of termination, *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 141-142 (1968); *Albrecht v. The Herald Co.*, 390 U.S. 145, 149-150 (1968); *U.S. v. Arnold Schwinn & Co.*, 388 U.S. 365, 372 and 391 n. 12 (1967); *U.S. v. Parke, Davis & Co.*, 362 U.S. 29, 44-46 (1960) and (d) unlawful concerted effort to police mavericks, *U.S. v. General Motors Corp.*, 384 U.S. 127 (1966).

[12]See *F.T.C. v. Motion Picture Advertising Service Co.*, 344 U.S. 392 (1953), *F.T.C. v. Brown Shoe Co.*, 384 U.S. 316 (1966), *F.T.C. v. Sperry & Hutchinson*, 405 U.S. 233, 239 (1972).

[13]N.C.G.S. § 75-5(b) (3) provides:

> To willfully destroy or injure, or undertake to destroy or injure, the business of any competitor or business rival in this State with the purpose of attempting to fix the price of any goods when the competition is removed. § 75-5(b) (3).

§ 75-5(b) (3) is part of North Carolina's established public policy. See *Bennett v. Railroad*, 211 N.C. 474, 191 S.E. 240 (1937).

common law of unfair competition,[14] (5) violation of common law limitations on supposedly absolute rights of termination[15] and (6) violation of a duty of good faith and fair dealing.[16]

In short, proof of "§ 1 facts" was but one arrow in ITCO's "quiver" (Pet. A-10, n.7)—but an important one and one worth fighting to preserve. Even Judge Russell, who dissented from the majority opinion, was quick to point out that the elimination of "§ 1 facts" from ITCO's § 75-1.1 claim would not be dispositive and that the case would still have to be remanded for trial as to the other arrows in the quiver:

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[14]Unfair competition, for the purposes of N.C.G.S. § 75-1.1, includes conduct "which a court of equity would consider unfair." *Harrington Mfg. Co., Inc. v. Powell Mfg. Co., Inc.*, 38 N.C. App. 393, 248 S.E.2d 739, 744 (1978), *cert denied*, 296 N.C. 411, 251 S.E.2d 469 (1979). In North Carolina, this includes unjust enrichment. See *Liberty/UA, Inc. v. Eastern Tape Corp.*, 11 N.C. App. 20, 180 S.E.2d 414, *cert. denied*, 278 N.C. 702, 181 S.E.2d 600 (1971).

[15]*General Tire and Rubber Co. v. Distributors, Inc.*, 253 N.C. 459, 117 S.E.2d 479 (1960) (contracts of indefinite duration may not be unilaterally terminated until they have been in effect long enough to accomplish their original purposes). See also *de Treville v. Outboard Marine Corp.*, 439 F.2d 1099 (4th Cir. 1971) (manner of termination of an annual agreement terminable on thirty days notice cannot be contrary to equity and good conscience).

[16]*Picture Lake Campground, Inc. v. Holiday Inns, Inc.*, 497 F.Supp. 858 (ED. Va. 1980). A minority of courts appear to raise the applicable standard of conduct even higher—to one of fiduciary duty. See, e.g. *Arnott v. American Oil Co.*, 609 F.2d 873 (8th Cir. 1979) *cert. denied*, 446 U.S. 918 (1980); *Atlantic Richfield Co. v. Razumic*, 480 Pa. 366, 390 A.2d 736, 742 (1978); *Carter Equipment Co. v. John Deere Industrial Equipment Co.*, 681 F.2d 386, 391 (5th Cir. 1982).

> This ruling would not mean that, to the extent North Carolina law includes provisions *additional to and different from* those facts that duplicate the federal antitrust statute, plaintiff's right to recover under those *additional and different provisions* of the North Carolina Statutes would not be barred, and I agree with the majority opinion that the summary judgment of the District Court dismissing such actions, if any exist, should be reversed. . . .

(Pet. A-25) (emphasis supplied).[17]

Since this case must necessarily be remanded, review by this Court would only result in a review of the contentions of the parties and the law applicable to those contentions in a case whose facts are yet to be adjudicated.

D. Even if the Fourth Circuit applied the wrong standard, there are facts shown by ITCO sufficient to go to trial on a conspiracy theory. Assuming, *arguendo,* that Michelin is correct in its statement that "[t]he opinion of the Court of Appeals rests totally upon ITCO's ability to support an inference of conspiracy under Section 1 of the Sherman Act" (Pet. 5), the evidence in this case would meet the standard of proof announced by this Court in

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[17]A similar acknowledgment was made in *Bostick, supra,* at 1220.

> "Moreover, there is no requirement in the Unfair Trade Practices Act of a contract, combination or conspiracy as there is under § 1 of the Sherman Act. It is therefore entirely possible that the jury could find Bostick to have been terminated in furtherance of unfair and anticompetitive purposes—e.g., to harm its business because of its role as a growing wholesale competitor of Michelin's—without rendering a verdict duplicative of the federal claims."

Section 39-5-20(a) of South Carolina's Unfair Trade Practices Act is identical to N.C.G.S. § 75-1.1.

Monsanto. The record shows that ITCO was prepared to put on evidence that "tends to exclude the possibility of independent action by the manufacturer and distributor." *Monsanto, supra* at 104 S.Ct. at 1473. In *Monsanto,* this Court determined that despite the application of an incorrect standard of proof of conspiracy by the circuit court, the evidence "created a jury issue as to whether Spray-Rite was terminated pursuant to a price-fixing conspiracy between Monsanto and its distributors." *Id.* As in *Monsanto,* there is strong evidence in this case that a distributor agreed to comply with Michelin's scheme so that it could be reinstated. There is also evidence that other distributors ceased wholesaling, against their business interests, to avoid termination. Likewise, there is evidence that, prior to termination, Michelin never discussed with ITCO any problems which would warrant termination. In fact, and most importantly, there is a written record of Michelin's reaction to dealer complaints and its consequent decision to eliminate the large wholesaler competition that was the genesis of those complaints. These are facts of the same character as those which created a jury issue in *Monsanto.* 104 S.Ct. at 1472.

Even if the Fourth Circuit had adhered to the standard it had announced in *Bostick, supra,* the standard announced in *Monsanto* would be utilized at trial. In light of the fact that § 1 of the Sherman Act is relevant only as a policy statement of what is unfair in competition—one arrow in ITCO's quiver—Michelin presents no compelling reason for review by writ of certiorari on this issue.

II.

The Fourth Circuit Did Not Err When It Rejected The Applicability of Res Judicata To This Case

Petitioner incorrectly states that "(t)he *res judicata* issue presented in this action is one of first impression." (Pet. 6). The legal issue is well settled and is in no need of revoluntionary change. The novel rule of law proposed by Michelin for Fourth Circuit acceptance ignored not only the salutary purposes of the doctrine of *res judicata,* but the sound policies inherent in the rules of procedure which allow plaintiffs to plead alternative theories of recovery in one case. *If* the Fourth Circuit had adopted this aberration of the doctrine of *res judicata,* ITCO would agree that there would be special and important reasons for the granting of the writ of certiorari. Had this occurred, it would have "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." U.S. Supreme Court Rule 17, 28 U.S.C.A. However, the Fourth Circuit recognized Michelin's attempt for what it was: "an application of *res judicata* in a fashion which has lost sight of that doctrine's underlying principles and purpose." (Pet. A-17). The Fourth Circuit did not err in this finding. As it noted,

> ITCO's decision to dismiss its Sherman Act claim appears to have been in furtherance of the doctrine's purpose in curbing needless litigation. Had ITCO *not* dismissed its federal claim and *not* sought an appeal, but, instead, taken its Sherman Act claim to trial, the prospect of wasteful duplicitous litigation would have arisen. Suppose, for instance, that the fact finder at that hypothesized trial were to reject ITCO's allegation of a price-fixing conspiracy . . . Michelin, in that

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> event, would be entitled to a judgment in its favor. ITCO, on the ensuing appeal, would be free to challenge the correctness of the summary judgment granted Michelin on the state law claim. It is entirely possible that, given such a procedural posture compelling us to consider the alternative theories of § 75-1.1 liability advanced by ITCO, we might conclude that ITCO should have been permitted a trial on any one or more of those alternative theories.

(Pet. A-16 through A-17).

ITCO took a voluntary dismissal with prejudice as to its § 1 claim after the District Court refused to certify on appeal its incongruous ruling on ITCO's § 75-1.1 claim. On appeal, Michelin attempted to pervert the doctrine of *res judicata* by suggesting that the dismissal of one alternative claim in a lawsuit bars another alternative claim in the *very same suit.* Such application does not advance the purposes of the doctrine of *res judicata;* it defeats the purposes the doctrine intends to serve. Petitioner has cited no case in which the doctrine of *res judicata* is applicable on these facts.

As stated by this Court in *Allen v. McCurry,* 449 U.S. 90, 94 (1980): *"res judicata* and collateral estoppel relieve parties of the cost and vexation of *multiple lawsuits,* conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication. * * *" (emphasis supplied). It is a policy designed to avoid the "second try"; a policy to avoid the "inefficiency of repeated controversy". Wright, Miller and Cooper *Federal Practice and Procedure,* § 4403 (1981). Under the doctrine of *res judicata,* "[p]laintiffs are *encouraged to bring related claims and parties into a single efficient suit* by rules that preclude later assertion of matters that should have been

advanced as part of a single claim or cause of action . . ." *Id.*

The policy of resolving matters in one trial is found not only in the doctrine of *res judicata* but also in the policies of the Federal Rules of Civil Procedure. Rule 8(e)(2) allows a party to "set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses." Michelin's interpretation of the doctrine of *res judicata* discourages pleadings in the alternative. The doctrine of *res judicata* has always encouraged litigants to raise all claims and theories in the first litigation lest they be lost forever. Michelin's construction of the doctrine discourages plaintiffs from raising all claims and theories in the first litigation for fear that those alternative claims might ultimately become a bar to the case.

The novelty of Michelin's theory can be seen in its reliance upon *Nash County Board of Education v. Biltmore Co.*, 640 F.2d 484 (4th Cir. 1981). *Nash* involved the issue of whether a consent agreement reached in one lawsuit should be accorded *res judicata* treatment in a subsequent lawsuit. The earlier suit was based on §75-1.1 and the *later* suit was based on the federal antitrust statutes. The Court held that the *second* suit was barred by the doctrine of *res judicata.* The policy stated in *Nash* is to prevent the plaintiff "after judgment in the state court" from seeking "another 'bite at the cherry' by filing a like action in federal court" *Id.* at 493. It would be anomalous indeed to interpret cases such as *Nash* to prevent plaintiffs from pleading and attempting to prove both state and federal antitrust violations in the same suit. The

essential policy of *Nash* is to encourage the inclusion of both causes of action in the same suit. *See also, Derish v. San Mateo-Burlingame Board of Realtors,* 724 F.2d 1347 (9th Cir. 1983) (*res judicata* bar of *Nash* not operative where there has been no prior lawsuit which adjudicated the issues in dispute).

Furthermore, Michelin's contentions lose sight of the fact that ITCO dismissed the §1 claim only after being assured that its right to prove "§1 facts" as an element of §75-1.1 liability was reserved. In response to an inquiry from Michelin's counsel, the District Court answered:

> I understand the effect of the plaintiff's motion to dismiss . . . with prejudice to mean that this plaintiff does not desire to litigate in this or any other court those two counts again; and that the judgment rendered on his motion allowing it will be with prejudice and be nonappealable. But *he is reserving his right to bring witnesses here who would have testified to facts which had they been within the context or the ambit of a Section 1 claim would also be relevant on the Chapter 75 claim. And I have told him and you that in my opinion the fact that he takes a dismissal with prejudice on a cause of action does not preclude his use of evidence which would have been favorable to him in that cause of action had it gone to trial.*

(Pet. A-18 through A-19) (emphasis supplied). Where such a reservation is made, *res judicata* will not operate as a bar. See *Marshall v. Barlow's, Inc.,* 436 U.S. 307, 310, n.4 (1978), referring to *Barlow's, Inc. v. Usery,* 424 F.Supp. 437 (D. Idaho 1977) at 439-440. *See also, In re The Pittsburgh and Lake Erie Railroad Company Securities and Antitrust Litigation,* 543 F.2d 1058, 1068 (3rd Cir. 1976).

This Court should conclude, as did the Fourth Circuit, that "[s]uch an application of *res judicata* would defeat the very purpose the doctrine is intended to serve." (Pet. A-19).

III.

The Fourth Circuit Did Not Err In Ruling That There Were Genuine Issues Of Material Fact To Be Tried Under N.C.G.S. §75-1.1

Monsanto, on which Michelin so heavily relies, itself states that a "manufacturer of course generally has a right to deal, or refuse to deal, with whomever it likes, *as long as it does so independently.*" 104 S.Ct. at 1469 (emphasis supplied). Michelin is not dissatisfied with the Fourth Circuit's application of the law. Michelin just does not like the facts of this case because the evidence raises a genuine issue of material fact as to whether Michelin acted independently. The doctrine enunciated by this Court in *Colgate, supra,* does not bar a plaintiff from presenting evidence sufficient to prove that the manufacturer is involved in concerted price fixing. *Monsanto, supra,* 104 S.Ct. at 1470. Neither does *Colgate* bar a plaintiff from proving violations of §75-1.1.

Michelin's reliance on *United Roasters, Inc., supra,* is also misplaced. In *United Roasters,* the Fourth Circuit held that mere intentional breach of contract is not a violation of N.C.G.S. §75-1.1. *Id.* at 992. The case simply does not resolve the issue of whether Michelin's acts are unfair or deceptive within the context of North Carolina law. In *United Roasters,* there was "no hint of any unfairness to either party before Colgate's cessation of performance." *Id.* at 992. The facts in this case show

more than a "hint" of unfairness. Michelin's contention that "[p]ermitting such a cause of action under a state unfair trade practice statute emasculates the *Colgate* rule and renders the end of every business relationship actionable" (Pet. 8) ignores the facts of the case. The North Carolina Supreme Court has held that "unfairness and deception are gauged by consideration of the effect of the practice on the marketplace". *Marshall v. Miller,* 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981). Michelin's conduct was unfair and deceptive as those terms are defined by the North Carolina courts. ITCO is prepared to prove at trial that Michelin's actions are offensive to established public policy. ITCO is also prepared to prove that the practices in which Michelin engaged are immoral, unethical, unscrupulous or substantially injurious to consumers. These are the factors cited by the North Carolina courts as determinative of a violation of §75-1.1. *Id.* Far from emasculating the *Colgate* doctrine, these facts fall within its confines. The factual issue is whether Michelin acted independently or, as the Fourth Circuit put it, whether "Michelin's decision to terminate its relationship with ITCO was a step in furtherance of a conspiracy to lessen price competition at the dealer level.". (Pet. A-14). That is a question for the trier of fact: but that issue of independent action is not dispositive because, as is shown above, even *unilateral* action is sanctionable under §75-1.1.

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CONCLUSION

For all the foregoing reasons, defendant's Petition for Certiorari should be denied.

Respectfully submitted,

/s/
JOHN R. JORDAN, JR.
(Counsel of Record)
CHARLES GORDON BROWN
MARTHA LEANN NEASE
JORDAN, BROWN, PRICE & WALL
Suite 100, One West Franklin Bldg.
P.O. Box 1210
Chapel Hill, NC 27514
(919) 968-1111

/s/
SAMUEL W. JOHNSON
MEADOWS, JOHNSON & SPINKS
P.O. Box 153
Rocky Mount, NC 27801
(919) 977-2211

/s/
JOHN F. DIENELT
BROWNSTEIN, ZEIDMAN & SCHOMER
Suite 900, 1025 Connecticut Avenue
Washington, DC 20036
(202) 457-6577

Counsel for Plaintiff-Respondent ITCO Corporation

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